

48A C.J.S. Judges § 368

Corpus Juris Secundum | August 2023 Update

Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D.; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

X. Special or Substitute Judges and Like Judicial Officers

C. Authority, Powers, and Duties of Special or Substitute Judge

§ 368. Status of special or substitute judges as de facto judges

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

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Where the selection of a special or substitute judge is authorized by law, a person who has been selected and has taken possession of the office, and acts under color of title, is a judge de facto whose acts are valid and binding.

As a general rule, provided the selection of a special or substitute judge is authorized by law, one who has been selected and has taken possession of the office, and therefore acts under color of title, is considered as a judge de facto,¹ and his or her right to the office is not open to question except in a direct proceeding brought by the State² or by the rightful incumbent.³ The judge's acts are not void⁴ but are valid and binding,⁵ as if he or she were a judge de jure,⁶ as to all interested persons⁷ except the State.⁸ The acts of a de facto special or substitute judge cannot be overthrown in collateral attack⁹ or in a direct attack, unless objections to his or her acting as judge are promptly made,¹⁰ except for jurisdictional defects.¹¹

On the other hand, where a person has not been properly appointed pursuant to a state constitution or statute and is acting without authority, the person is not a judge de facto, and a judgment entered by such person is void due to a lack of judicial authority even if it was likely that the judge would have been appointed to serve as an acting judge had the proper procedures been followed.¹²

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Footnotes

¹ Mo.—[Buchanan v. Buchanan](#), 167 S.W.3d 698 (Mo. 2005).

Wash.—[Barrett-Smith v. Barrett-Smith](#), 110 Wash. App. 87, 38 P.3d 1030 (Div. 2 2002).

Despite failure to meet state residency requirement

Alaska—*Gates v. City of Tenakee Springs*, 954 P.2d 1035 (Alaska 1998).

Oath required

Tex.—*Enloe v. State*, 141 Tex. Crim. 602, 150 S.W.2d 1039 (1941).

2 Okla.—*Castle v. State*, 1964 OK CR 52, 392 P.2d 758 (Okla. Crim. App. 1964).

3 Kan.—*State v. Roberts*, 130 Kan. 754, 288 P. 761 (1930).

4 Tenn.—*State v. Posey*, 99 S.W.3d 141 (Tenn. Crim. App. 2002).

Wash.—*Barrett-Smith v. Barrett-Smith*, 110 Wash. App. 87, 38 P.3d 1030 (Div. 2 2002).

5 Ind.—*Hill v. State*, 646 N.E.2d 374 (Ind. Ct. App. 1995).

Miss.—*McDonald v. McDonald*, 850 So. 2d 1182 (Miss. Ct. App. 2002), *aff'd*, 876 So. 2d 296 (Miss. 2004).

No timely objection to residency

Ala.—*Gwin v. State*, 808 So. 2d 65 (Ala. 2001).

6 N.C.—*People ex rel. Duncan v. Beach*, 294 N.C. 713, 242 S.E.2d 796 (1978).

7 N.C.—*People ex rel. Duncan v. Beach*, 294 N.C. 713, 242 S.E.2d 796 (1978).

W. Va.—*State ex rel. Matko v. Ziegler*, 154 W. Va. 872, 179 S.E.2d 735 (1971).

8 Or.—*State ex rel. Madden v. Crawford*, 207 Or. 76, 295 P.2d 174 (1956).

9 Miss.—*Nelson v. State*, 626 So. 2d 121 (Miss. 1993).

10 Ind.—*State ex rel. Crowmer v. Superior Court of Marion County*, 237 Ind. 633, 146 N.E.2d 88 (1957).

As to waiver of objections, see § 374.

11 Ind.—*Zonker v. Cowan*, 84 Ind. 395, 1882 WL 6335 (1882).

12 Colo.—*People v. Torkelson*, 22 P.3d 560 (Colo. App. 2000), as modified on denial of reh'g, (Mar. 29, 2001).